No. 87-645

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,
*Petitioners,*

v.

WESTERN NUCLEAR, INC., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), provides that the Department of Energy ("DOE"), "to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer [enrichment] services" for foreign-source uranium destined for domestic use.

The question presented is whether Section 161(v) requires DOE to restrict enrichment of foreign-source uranium when the domestic uranium industry is not viable.

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO SUP. CT. RULE 28.1

The petitioners are the United States Department of Energy ("DOE") and the following officers or employees of DOE who were sued in their official capacities: John S. Herrington, Secretary of Energy, F. Clark Huffman, Sherry E. Peske, Philip G. Sewell, James W. Vaughn, and Joseph F. Salgado.

Respondents are Western Nuclear, Inc., Energy Fuels Nuclear, Inc., and Uranium Resources, Inc. Western Nuclear, Inc. is a wholly-owned subsidiary of Phelps Dodge Corporation. Energy Fuels Nuclear, Inc. is wholly owned by JRA Enterprises, Ltd., a Colorado limited partnership. The sole general partner of JRA Enterprises, Ltd. is John R. Adams.

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## RESPONDENTS' BRIEF IN OPPOSITION

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### STATEMENT

This case presents a straightforward question of statutory interpretation. Much of the factual recitation in the petition, however, has no bearing on that question. Indeed, the petition as a whole is remarkable for its avoidance of any meaningful discussion of the *purpose* of the statutory provision at issue.

#### A. Statutory and Regulatory Background

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. § 2201(v), authorizes the Atomic Energy Com-

mission ("AEC") to contract with operators of nuclear reactors for the enrichment of uranium fuel.[1] That authorization is subject to a number of limitations, including the following proviso:

> That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

Congress' purpose in enacting the statutory restriction on enrichment of foreign-source uranium was "to assure the viability of the domestic uranium industry" in the face of "substantial imports of foreign uranium for enrichment and sale on the domestic market." Congress found the health of the domestic uranium industry to be "closely related to our vital defense and security interests." S. Rep. No. 1325, 88th Cong., 2d Sess. 16, 17 (1964).

Consistent with the statutory mandate, the AEC in 1966 adopted "criteria" for the enrichment program that barred *any* enrichment of foreign source uranium for domestic end use. 31 Fed. Reg. 16,479 (1966). For more than a decade, the enrichment of foreign-source uranium was prohibited entirely.

In 1968, the AEC advised Congress that any future relaxation of the enrichment restriction would be "consistent with reasonable assurance of the viability of the domestic uranium industry."[2] In 1972, the AEC Chair-

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[1] The DOE has succeeded to the responsibilities of the AEC under Section 161(v). The AEC's licensing and related regulatory functions have been transferred to the Nuclear Regulatory Commission ("NRC"). *See* Pet. 5 n.2.

[2] Atomic Energy Commission, 1968 Statement on Uranium Supply Policies and Related Activities, *reprinted in Status of the*



man testified that modification of the existing ban on enrichment of foreign uranium would be undertaken only if it was consistent with the maintenance of a viable domestic uranium industry. The Chairman explained that the restriction might be

> adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry . . . . If there are American uranium reserves to be exploited, the intention would be that those reserves would be exploited.[3]

In 1974, the AEC concluded that the demand for uranium was likely to expand dramatically, and that restrictions on enrichment of foreign-source uranium could be phased out gradually without adversely affecting the viability of the domestic uranium industry. The agency proposed to begin removing the restrictions in 1977 and to lift all restrictions by the end of 1983. 39 Fed. Reg. 38,016 (1974). The AEC Chairman assured Congress that restrictions would be reimposed if the viability of the domestic uranium industry were threatened:

> Should there be any indication that the proposed schedule [of eliminating restrictions] is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate.[4]

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*Domestic Uranium Mining and Milling Industry, The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 415 (1981).

[3] *AEC Authorizing Legislation, Fiscal Year 1973: Hearings Before the Joint Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2,328 (1972) (testimony of James R. Schlesinger).

[4] *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy*, 93rd Cong., 2d Sess. 6 (1974) (testimony of Wm. A. Anders). Another AEC witness emphasized that, in the event of a massive increase in low-priced imports of uranium,

Domestic production of uranium increased significantly in response to the AEC's predictions of greatly increasing demand. Increased demand for nuclear fuel and the AEC's decision to cease taking new enrichment orders in 1974 also encouraged foreign entities to construct enrichment facilities, thus ending this country's monopoly over the provision of enrichment services for commercial nuclear reactors.[5]

In fact, the increase in uranium demand was not nearly as dramatic as the AEC had predicted. Orders for new nuclear reactors in the United States declined drastically in the late 1970s and disappeared entirely after 1978. This created a glut in the uranium market and a corresponding decline in the price of uranium ore. Pet. App. 5a.[6]

As early as 1981, representatives of the domestic uranium industry requested DOE to reimpose restrictions on the enrichment of foreign uranium, but DOE has consistently refused to do so. The result has been economic disaster for the industry. A recent report issued by the Senate Committee on Energy and Natural Resources summarizes the situation as follows:

> The Energy Information Administration (EIA) of the Department of Energy found, in its 1985 report, that annual domestic uranium production was

"[w]e will still be living under the restriction in the act that the viability of the domestic industry is the criterion"; that "we would be obligated under the act" to reimpose restrictions because of "the viability issue"; and that "the matter of the viability of the domestic industry is a legal requirement on the Commission under the Act." *Id.* at 129, 134-35 (testimony of George F. Quinn).

[5] S. Rep. No. 100-214, 100th Cong., 1st Sess. 14-15 (1987).

[6] Nonetheless, according to recent DOE estimates, by the year 2000 domestic demand for uranium is expected to increase by 30 percent and world-wide demand is expected to double. *See* Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment* 28 (1985).



> at its lowest level since the mid-1950's, while exploration and development drilling had dipped to their lowest points since the mid-1960's. The EIA also found employment down to 2,400 person-years in 1985 from 13,700 person-years in 1981. According to testimony given by the EIA before the Senate Committee on Energy and Natural Resources on March 9, 1987, the number of operating mines dropped to 3 in 1986, compared to 362 in 1979. Net earnings for the industry in 1984 and 1985 were negative.[7]

Meanwhile, as DOE has acknowledged, the percentage of foreign-source uranium enriched by DOE for domestic end use climbed steadily from 10 percent in 1981 to approximately 50 percent in 1986,[8] and it continues to increase significantly.

### B. The Proceedings Below and Concurrent Administrative and Legislative Developments

Respondents, uranium mining and milling companies, filed this lawsuit in December 1984, seeking to compel DOE to take action under Section 161(v) to restrict the enrichment of foreign-source uranium so as to assure the viability of the domestic uranium industry. DOE, despite overwhelming evidence to the contrary, maintained at that time that the domestic industry was still "viable," and it refused to impose any restrictions pursuant to the statute.[9]

In September 1985, however, while the action was still pending in the district court, DOE issued a formal finding that the industry had not been viable for calendar year 1984. Pet. App. 6a.[10] DOE subsequently found that

[7] S. Rep. No. 100-214, *supra*, at 9.

[8] Peske Affidavit (June 23, 1986), Appendix to Appellants' Motion for Stay in Court of Appeals, at 87-88.

[9] *See* Energy Information Adm., DOE, *Domestic Uranium Mining and Milling Industry: 1983 Viability Assessment* (1984).

[10] DOE made its determination pursuant to 42 U.S.C. § 2210b, which requires DOE to make an annual assessment of the indus-

the industry was not viable in 1985. *Id.* The parties agree that the industry continues to be non-viable.

Following DOE's September 1985 determination of non-viability, the parties filed cross motions for summary judgment. Respondents contended that, given the concededly non-viable state of the domestic uranium industry, Section 161(v) required DOE to take action to restrict enrichment of foreign uranium, to the extent necessary to assure the viability of the industry. Petitioners contended that respondents had no right to complain of DOE's inaction under Section 161(v) because DOE had been given broad and essentially unreviewable discretion to decide whether or not to impose enrichment restrictions.[11]

The district court granted respondents' motion for summary judgment. Pet. App. 22a-24a. On June 20, 1986, it entered an order requiring DOE (1) to restrict enrichment of foreign-source uranium to no more than 25 percent of its total enrichment activity for the remainder of the year; (2) to cease enrichment of foreign-source uranium entirely commencing in 1987 (and thus to return to the agency's practice from 1966 to 1977); and (3) to commence a rulemaking to determine whether "criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry." *Id.* at 23a. DOE has not yet commenced such a rulemaking.

Meanwhile, in September 1985, the district court had entered summary judgment for respondents on a separate

try's viability. Before Congress enacted Section 2210b in 1982, DOE had failed to make an assessment of the viability of the industry since 1973. One of the purposes of Section 2210b was "to compel the implementation of Section 161(v)." 128 Cong. Rec. H8803 (daily ed. Dec. 2, 1982) (remarks of Rep. Lujan).

[11] Memorandum in Support of Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 17-25 (Sept. 30, 1985).



count of their complaint that challenged the validity of DOE's standard form enrichment contract on the ground that DOE had not satisfied certain procedural requirements attendant to modification of that contract.[12] Thereafter, in January 1986, DOE sought to cure the procedural infirmities identified by the district court by commencing a rulemaking proceeding. In its notice of proposed rulemaking, DOE stated its intent not to impose any restrictions on the enrichment of foreign-source uranium. 51 Fed. Reg. 3,624 (1986).

On July 29, 1986, more than one month after the district court's issuance of the order challenged here, DOE issued a final rule. 51 Fed. Reg. 27,132. DOE concluded that, notwithstanding the non-viability of the domestic uranium industry, it would not impose restrictions on the enrichment of foreign-source uranium. One evident purpose of the rulemaking was to attempt to strengthen DOE's litigating posture on appeal in defense of its interpretation of Section 161(v) in the present litigation:

> DOE believes that the *Western Nuclear* judgment is erroneous. . . . DOE is mindful of the ongoing nature of the *Western Nuclear* litigation. Section 762.3 [the rule refusing to impose enrichment restrictions] is being adopted at this time, notwithstanding the *Western Nuclear* litigation, in order to formally record DOE's interpretation of section 161(v), to state DOE's determination that restrictions on enrichment of foreign origin uranium would continue to be inappropriate, to establish the criterion that will be applicable to the enrichment of foreign origin uranium, and to permit Congressional review of that criterion.

*Id.* at 27,134 n.4.[13]

[12] The petition for certiorari does not address the merits of the district court's decision on this issue.

[13] In the rulemaking, DOE attempted to justify its refusal to impose restrictions on the enrichment of foreign uranium. *Id.* at 27,134-38. DOE argued that Section 161(v) requires restrictions

On October 18, 1986, Congress enacted Section 305 of Pub. L. No. 99-500, 100 Stat. 1783-209.[14] Section 305 provides, *inter alia*, that no provision of DOE's July 1986 final rule "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210.

On July 20, 1987, the court of appeals affirmed the district court's order. Pet. App. 1a-21a. Noting that it was required to accord "great deference" to the agency's interpretation of the statue, *id.* at 14a-15a, the court nonetheless concluded that DOE's position was contrary to the express language and legislative history of Section 161(v). The court observed that DOE "cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—without imposing restrictions on enrichment of foreign uranium. Rather, the DOE proposes to abandon the statutory goal." *Id.* at 18a. The court concluded:

---

only if DOE makes a finding that such restrictions "are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry." *Id.* at 27,134. DOE asserted that restrictions would not be sufficient to restore the viability of the domestic industry because restrictions would have the effect of increasing the cost of DOE's enrichment services, and DOE could not insure that its enrichment customers would not seek to have foreign uranium enriched by DOE's lower-priced foreign competitors. *Id.* at 27,135-38. Furthermore, DOE asserted that, notwithstanding the poor health of the domestic uranium industry, DOE has a "responsibility to maintain a healthy *enrichment* program which transcends economic considerations." *Id.* at 27,137 (emphasis added). In other words, DOE claimed that enrichment restrictions would be inappropriate because they would conflict with other policy objectives unrelated to the viability of the domestic industry.

[14] Section 305 of Pub. L. No. 99-500 is set forth in an appendix to this brief. App., *infra*, 1a-3a.



> The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. It must continue to increase restrictions until the domestic industry becomes viable. The DOE's argument that this policy is not wise in the present uranium market should be made to Congress and not to the courts. We can only apply the statute as Congress passed it.

*Id.*

## ARGUMENT

This case involves a narrow issue of statutory construction, and petitioners have identified no general legal principle implicated here that would affect the disposition of any other case. Moreover, the decision below is correct and concededly does not conflict with the decision of any other court. Thus, under this Court's traditional certiorari criteria, further review is unwarranted.

1. Notwithstanding petitioners' efforts to rewrite the statute and the legislative history, and DOE's post hoc attempt to bolster its litigation posture through rulemaking, the decision below is clearly correct.

a. Section 161(v) plainly states that DOE "shall not offer" its enrichment services for foreign uranium, "to the extent necessary to assure the maintenance of a viable domestic uranium industry." It is undisputed that the domestic uranium industry is not presently viable, but DOE continues to enrich foreign uranium without restrictions.

Petitioners attempt to defend DOE's actions by contending (Pet. 17) that, as a "triggering" condition precedent to the imposition of enrichment restrictions under the statute, DOE must first find that such restrictions would in fact resuscitate a non-viable domestic uranium

industry. But nothing in the statute mentions such a "trigger" or suggests that DOE is empowered to make such a finding. Instead, the statute permits DOE to enrich foreign uranium only to the extent consistent with the maintenance of a viable domestic uranium industry.[15] If the domestic industry is *not* viable, DOE has no authority simply to ignore the command that it not offer enrichment services for foreign uranium to the extent necessary to assure viability. In such a situation, if DOE has not imposed any restrictions on the enrichment of foreign uranium, then it has failed to perform the duty required by statute.

b. The legislative history confirms that both courts below were correct in their reading of the statute. Congress clearly intended the statute as a mandatory command "not to offer such [enrichment] services," and it intended that the command be heeded "to the extent necessary to assure the maintenance of a viable domestic uranium industry." S. Rep. No. 1325, *supra*, at 30 (App., *infra*, 4a); *see also* pp. 2-3, *supra*.

To support their contrary position, petitioners select out-of-context snippets from a report by the Joint Committee, to the effect that Section 161(v) would impose a "flexible" restriction and would require the agency to "offer *or refuse to offer* enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry."[16] Viewed in context, these statements are entirely consistent with respondents' position, and refute the position taken by petitioners.

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[15] As the court of appeals concluded, Pet. App. 17a-18a, the statute permits restrictions of less than 100 percent only if such lesser restrictions would assure the viability of the domestic industry.

[16] The italicized phrase "*or refuse to offer*" is omitted from petitioners' selective quotation. *Compare* Pet. 18 *with* S. Rep. No. 1325, *supra*, at 31. Respondents invite the Court's attention to the entire passage from the Joint Committee's report, which is set forth in an appendix to this brief. App., *infra*, 4a-5a.



As the Joint Committee explained, the term "flexible" in this context denotes, not flexibility as to whether or not to impose any restrictions when the viability of the domestic industry is threatened, but only flexibility "as to the duration and degree of the restriction." S. Rep. No. 1325, *supra*, at 31 (App., *infra*, 5a). It is clear in context that Congress viewed Section 161(v) as an alternative to a proposed outright ban on foreign enrichment that would have expired automatically after ten years. *Id.* at 30-31 (App., *infra*, 4a-5a). Instead, Congress enacted a flexible ban keyed to maintaining the viability of the domestic industry.

Petitioners contend (Pet. 18) that the Committee's use of the phrase "in its opinion" indicates that the statute "was thought of as a standard calling for the exercise of judgment by the Secretary, not as an automatic cutoff." Petitioners, however, conveniently ignore the fact that DOE has not exercised its judgment so as to assure the viability of the domestic industry. Rather, it has violated the statutory mandate by continuing to offer enrichment services on a basis that, "in its opinion," undoubtedly will *not* assure the maintenance of a viable domestic uranium industry.

c. Petitioners' reliance (Pet. 19-21) on *Young v. Community Nutrition Institute*, 106 S. Ct. 2360 (1986), is entirely misplaced. The statute in *Young* provided that, when certain poisonous substances were unavoidably present in food, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to the extent that he finds necessary for the protection of public health." *Id.* at 2363, *quoting* 21 U.S.C. § 346. The Court in *Young* deferred to the agency's long-standing interpretation that the phrase "to the extent that he finds necessary" modified "shall promulgate regulations." Under this interpretation, the Secretary had discretion to "find" the extent to which it was necessary to promulgate regulations in order to fulfill the statutory purpose of the "protection of public health." The Secretary in

*Young* had decided that "action levels," rather than formally-promulgated "tolerance levels," would achieve the statutory purpose.

In this case, there is no dispute that the phrase "to the extent necessary" modifies the phrase "shall not offer." The critical distinction, however, is that in *Young* the agency determined that it could achieve the statutory purpose—the protection of public health—by means other than formal regulations. Here, as the court of appeals concluded, Pet. App. 18a, DOE has simply abandoned the statutory goal of assuring the viability of the domestic uranium industry. Unlike the agency in *Young*, DOE has not performed the statutorily mandated action—restricting the enrichment of foreign uranium—"to the extent necessary" to achieve the statutory purpose.

Nor is petitioners' position grounded on a well-settled agency interpretation of the statute warranting judicial deference, as in *Young*. On the contrary, petitioners' present position directly conflicts with the position taken by the agency through the years. *See* pp. 2-3, *supra*. Thus, petitioners' current view of the statute need not be accorded deference. *See INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 n.30 (1987).

Furthermore, petitioners improperly seek to draw support for their new interpretation from assertions set forth in DOE's July 1986 rulemaking, which was not issued until after the district court had entered its order in this case rejecting petitioners' construction of Section 161(v). DOE's July 1986 rulemaking, which is not part of the record of this case, is merely a post hoc rationalization by the agency in support of its litigating position, and is entitled to no deference whatsoever. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

Petitioners' heavy reliance (Pet. 11-12, 17, 21-27 & nn. 14-16, 18-19) on the July 1986 rulemaking is particularly troublesome in light of Congress' explicit direc-



tive, in Section 305 of Pub. L. No. 99-500, that "no provision" of DOE's July 1986 rules "shall affect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities." 100 Stat. 1783-210. App., *infra*, 2a-3a. Thus, Congress has spoken, and DOE's July 1986 rulemaking cannot and should not be considered in resolving the issue presented in this case.

2. As shown above, the plain language and legislative history of Section 161(v) refute petitioners' position that DOE can avoid imposing enrichment restrictions so long as the agency has not made a "triggering" finding that such restrictions "in fact, will" restore the domestic uranium industry to viability. Petitioners' position, moreover, is fatally flawed on its own terms. Petitioners have confused the question whether restrictions are *necessary* with the question whether they would be *sufficient* to assure the viability of the domestic industry. Petitioners do not claim that the domestic uranium industry cannot attain viability.[17] They simply assert that the single act required by Section 161(v)—restricting enrichment of foreign uranium—would not *by itself* restore the industry. But that does not mean that restrictions are not *necessary*; it means only that restrictions alone, in petitioners' view, may not be *sufficient* to ensure viability. The sufficiency *vel non* of restrictions, however, is irrelevant under the statute.[18]

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[17] There is thus no basis in reality for the absurd hypothetical of exhausted domestic reserves posed by petitioners (Pet. 19). The hypothetical in any event does not illuminate congressional intent because Congress never contemplated such a fanciful situation, and would surely enact "appropriate legislation" if domestic reserves were in fact ever exhausted. *See* 42 U.S.C. § 2013(f).

[18] If the statute said that the Secretary shall restrict imports of foreign uranium "to the extent necessary to assure a positive

Petitioners' argument that enrichment restrictions would not assist the industry is in large measure premised upon DOE's lack of a complete monopoly on enrichment services (Pet. 22). But this argument overlooks the fact that the government is currently authorized by existing statutes and regulations to restrict the importation of enriched uranium, and thus has the means to prevent defection by DOE's domestic enrichment customers. *See* 42 U.S.C. § 2201(b), (p). Petitioners acknowledge that the NRC is required to deny any license to import special nuclear material that "would be inimical to the common defense and security," 42 U.S.C. § 2099, and they appear to concede that this provision would provide "authority under the Atomic Energy Act to restrict sales of enriched uranium on the secondary market or uranium imports." Pet. 8 n.5. It therefore is apparent that the government has available the means to make enrichment restrictions a powerful tool for restoring the viability of the domestic uranium industry.[19]

Furthermore, it is outrageous for petitioners to claim that DOE need not comply with the statute because, in their view, restrictions would not, in and of themselves, suffice to restore the presently non-viable uranium in-

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balance of trade," there would be no question that restrictions would have to be imposed when the balance of trade was negative, regardless whether the restrictions by themselves would be sufficient to restore a positive balance of trade. The agency would not have the power to pronounce the trade deficit a complex and intractable problem and refuse to impose any restrictions at all.

[19] The fact that the NRC, rather than DOE, has licensing authority over uranium imports provides no basis for DOE to avoid its obligations under Section 161(v). Before the AEC was abolished, that agency had sole authority to restrict both enrichment of foreign uranium and importation of uranium enriched abroad. In transferring the responsibilities of the AEC to the newly-created agencies, Congress could not have intended to permit DOE to avoid its statutory obligations through an Alphonse-Gaston approach to statutory construction.



dustry to viability. For years, DOE ignored the pleas of the domestic industry that Section 161(v) required the agency to impose enrichment restrictions in order to maintain the industry's viability. If petitioners are correct, an agency like DOE could veto a congressional policy directive simply by sitting on its hands and ignoring its statutory obligations for a long enough period of time to render action under the statute ineffective.

3. Petitioners assert (Pet. 3) that review is necessary because the case has "great practical importance." But the practical concerns raised by petitioners provide no basis for disregarding the clear intent of Congress, as reflected in the language and history of the statute, to assure the viability of the domestic uranium industry by requiring the imposition of restrictions on the enrichment of foreign uranium. As shown above, DOE appears to have abandoned that statutory purpose because of concerns about the future of DOE's enrichment program. *See* p. 8, n.13, *supra*. Congress, however, did not leave to DOE the discretion to weigh such concerns against the need to assure the viability of the uranium industry. On the contrary, Congress itself made that policy choice in enacting Section 161(v). In these circumstances, as the court of appeals correctly observed, Pet. App. 18a, petitioners' concerns are more properly addressed to Congress than to the courts.[20]

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[20] Congress in fact is currently considering legislation that would attempt both to assure the viability of the domestic uranium industry and to meet the concerns of DOE about the soundness of its enrichment enterprise. The legislation would replace Section 161(v) with a system of graduated charges payable by domestic reactor operators for the use of foreign uranium, and would turn DOE's enrichment enterprise over to a new Government-owned corporation. *See* S. Rep. No. 100-214, 100th Cong., 1st Sess. (1987) (favorable report by Senate Energy and Natural Resources Committee on S. 1846). This proposed legislation, if enacted, would render the issue presented in this case essentially moot. The pendency of the legislation reinforces the conclusion that it is

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1987

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Congress, not the courts, that should resolve the policy issues posed by the petition.

# APPENDICES

## APPENDIX A

Pub. L. No. 99-500, § 305, 100 Stat. 1783-209 to 210 (1986), provides:

> SEC. 305. None of the funds provided in this joint resolution or in any other law may be used to implement the following provisions of the uranium enrichment criteria submitted to Congress on July 24, 1986:
>
> (i) section 762.3, which specifies the permitted enrichment of source material of foreign origin for use in domestic utilization facilities;
>
> (ii) the third sentence of section 762.11, to the extent that it provides limitations on free choice of transaction tails assays from 0.2 percent to 0.3 percent U-235 or imposition of an additional charge for selections in that range;
>
> (iii) section 762.15, to the extent it might be construed to validate contract provisions permitting unrestricted delivery and enrichment of foreign-origin feed material after a final court decision requiring restriction of enrichment of foreign-origin source material for domestic use or permitting imposition of additional charges for customer selections of transaction tails assays within the range of 0.2 percent to 0.3 percent U-235;
>
> (iv) any portion of the criteria or provision in any contact [*sic*] which permits or results in reduction of the amount of feed material otherwise required to be delivered to DOE by commercial customers as a result of use of source material or special nuclear material from the government stockpiles in providing toll enrichment services for commercial customers;

(v) section 762.6 hereafter, insofar as it may convey a determination of the level of unrecouped costs that must be returned to the Treasury by the enrichment program, which determination shall be made by the Congress in future legislation.

The funds provided in this joint resolution shall be used to operate the enrichment program, consistent with the spending limitations imposed by this section, on the basis that the uranium enrichment criteria submitted to Congress on July 24, 1986 (except section 762.3 thereof) are in force and effect as modified above; *Provided*, That notwithstanding the effectiveness of the criteria as described above until amended or superseded in accordance with the Atomic Energy Act, except as is otherwise specifically provided by law, foreign-origin uranium may be enriched for domestic use only until a final judgment or dismissal in the pending litigation that determines whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material, in which case the criteria shall be amended to impose such restrictions, or such unrestricted enrichment may continue, whichever is consistent with the decision of this question in the pending litigation; *Provided further*, That in expending funds hereunder, the Department shall be required to offer each customer, free of additional charge and irrespective of percentage of requirements contracted for, a transaction tails assay from 0.2 percent to 0.3 percent U-235; *Provided further*, That no provision of this joint resolution or the July 24, 1986, criteria shall affect the merits of the legal position of any of the parties concerning the questions whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in



domestic utilization facilities, and whether distribution may be made of source material or special nuclear material from the government stockpile for commercial customers, in the pending litigation in the United States Court of Appeals for the Tenth Circuit and in the United States District Court for the District of Colorado.

## APPENDIX B

Excerpt from Senate Report No. 1325, 88th Cong., 2d Sess. 30-31 (1964):

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In the second proviso, the Commission is directed not to offer services under paragraph (A) or (B) of this subsection for source or special nuclear material of foreign origin "intended for use in a utilization facility within or under the jurisdiction of the United States." The Commission is directed not to offer such services for such material "to the extent necessary to assure the maintenance of a viable domestic uranium industry." In implementing this subsection, the Commission will be expected to examine carefully each proposed arrangement involving the enrichment of uranium of foreign origin to determine whether the enriched product is for ultimate use in a utilization facility within or under the jurisdiction of the United States.

In testifying before the Joint Committee, witnesses representing the Atomic Energy Commission stated that in the early years, following the initiation of uranium enrichment services by the Commission, uranium of foreign origin would not be toll enriched except where the enriched product was to be "reexported for foreign consumption." Commission witnesses stated that "this restriction would be removed July 1, 1975, when the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." The Commission further indicated that this restriction would be subject to periodic review and possible adjustment.

In the committee's view the maintenance of a viable domestic industry is an integral part of a sound



nuclear industry and may, indeed, be closely intertwined with the defense and security interests of the United States. The committee believes that this matter is of sufficient importance to be treated specifically in the legislation.

The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to the duration and degree of the restriction. While it is possible that by 1975 substantial amounts of uranium could be freely imported into the United States for enrichment and sale on the domestic market, one cannot at this time predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence.

Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry.

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